SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1088

THE OFFSHORE COMPANY,

Petitioner,

– AGAINST –

G. & H. OFFSHORE TOWING CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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2. Should not the owner of a tug whose master has been found grossly negligent and who displayed an attitude of callous indifference to the welfare of the tow entrusted to his care be held liable for failure to come forward with evidence as to when and where and under what circumstances the tow was damaged. It is undisputed that the tow was unmanned; that it was delivered to the tug in good condition and was then in every respect seaworthy. It is also undisputed that the tug at all times had sole custody and control of the tow.

3. Does the *res ipsa loquitor* doctrine apply in admiralty with respect to a tug having complete custody and control of an unmanned barge which becomes damaged while being towed in the open unobstructed waters of the Gulf of Mexico while on a voyage from offshore Louisiana to Trinidad?

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No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable, The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the judgment of that Court filed on November 27, 1968.

OPINIONS OF THE COURTS BELOW

The opinion of the District Court is reported at 262 F. Supp. 282, 1966 A.M.C. 2172 and is reproduced in Appendix A. The District Court held in favor of libelant and referred the matter to a Special Commissioner regarding damages.

The Special Commissioner's Report and the District Court's opinion confirming same are reported at 1967

A.M.C. 1597, ...; ..... F. Supp. ....., and are reproduced in Appendix B.

The opinion of the Court of Appeals is reported at ..... F. Supp. ....., and is reproduced in Appendix C.

JURISDICTION

The judgment of the Court of Appeals was filed on November 27, 1968. Jurisdiction of this Court is invoked under Title 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. When a tort feasor has complete custody and control of a barge damaged while in its possession, is it fair to select an arbitrary time approximately 7 hours after the tort feasor's negligence commenced, and to place upon an innocent and injured party the burden of segregating the damage, if any, which occurred prior to such arbitrary time from that which occurred thereafter?

2. Should not the owner of a tug whose master has been found grossly negligent and who displayed an attitude of callous indifference to the welfare of the tow entrusted to his care be held liable for failure to come forward with evidence as to when and where and under what circumstances the tow was damaged? It is undisputed that the tow was unmanned; that it was delivered to the tug in good condition and was then in every respect seaworthy. It is also undisputed that the tug at all times had sole custody and control of the tow.

3. Does the *res ipsa loquitor* doctrine apply in admiralty with respect to a tug having complete custody and control of an unmanned barge which becomes damaged while being towed in the open unobstructed waters of the Gulf of

Mexico while on a voyage from offshore Louisiana to Trinidad?

STATEMENT OF THE CASE

On January 9, 1964, The Offshore Company delivered an all-welded steel barge to the Tug JUNO for towage from offshore Louisiana to Trinidad.

The JUNO's captain, her officers and crew, without exception, all testified that at the time of delivery the barge was in good condition, thus making the testimony unanimous and establishing beyond any doubt that the barge was in fact sound, seaworthy and entirely suitable for the proposed towage, and the district court so found (353).*

The barge is constructed of ½" steel plating and has dimensions of 101' x 80' x 12'. The hull is divided into eight (8) separate watertight compartments.

A generator house, which contained various electrical controls and equipment, is located near the forward starboard corner of the barge's main deck. (See Exhibit 1, photograph reproduced as Appendix F).

The barge was completely unmanned. Libelant had no employee aboard either the barge or the Tug JUNO whose master, officers and crew had complete custody and control of the barge and were fully in charge of her and of her towage. (354)

Towage commenced off the coast of Morgan City, Louisiana at about 5 P.M. on January 9, 1964, en route to Trinidad via Yucatan Strait off the western tip of Cuba (See Exh. 3, a chart reproduced in Appendix H). The next time any employee or representative of The Offshore Company saw the barge was on January 21, 1964 at Key West, Flor-

* References unless otherwise stated are to pages of the original record on appeal and reproduced in Appendix A.

ida, some 12 days after towage commenced, at which time the barge was in damaged condition. (357)

The damage falls into two separate and distinct categories: (a) Physical damage to the forward end of her ½" steel plated hull, which had been forcibly holed, dented and punctured and (b) damage to the electrical equipment within the generator house located on the main deck of the barge at her forward, starboard side.

Upon arrival at Key West, the barge was down ten feet six inches (10'6") by her head. Her main deck port side, forward, was at sea level. Her main deck starboard side, forward, was ten inches (10") under water.

When asked for an explanation as to what had happened, the tug's master and officers said that they did not know. (357)

The Offshore Company filed a libel in the United States District Court for the Southern District of Texas, Houston Division, against the Tug JUNO, *in rem*, and against her owner, G. &. H. Offshore Towing Company, Inc., to recover damages for (a) cost of repairing the forward end of the barge's ½" steel bow plating, (b) cost of repairs to electrical equipment in the generator house located on the main deck of the barge and (c) loss of use of the drilling barge.

The Offshore Company had no knowledge as to what took place during towage and all testimony on that subject was given by the tug's personnel. The tug's navigator, Captain Williams, testified that the barge handled very well and that everything proceeded normally for the first seven days of towage; that at about daybreak on January 17, 1964, he noticed that something was wrong with the barge and summoned the tug's master, Captain George E.

Ives, to discuss the matter with him. This occurred, according to the navigator, at about 5:30 A.M. and the Court so found. (355)

Although the master and the navigator knew of trouble at about 5:30 A.M. on January 17, the first entry in the tug's log concerning the barge appears in connection with an entry at 0830 which states (Ex. 4, log book):

> "Offshore 58# seems to be going down by the bow. Keeping close watch on rig."

The next entry is for 12 o'clock noon, reading:

> "Offshore 58# has settled by head app. 3 ft. Tug and tow rolling and pitching heavily to very rough N.W.'ly sea. Cannot contact marine operators."

Surprisingly, the JUNO made no reduction in speed and no change of course at any time after the Captain and navigator discussed the barge's condition at daybreak on January 17; nor was there any reduction in speed or change in course after either the 0830 entry or the 12 o'clock noon entry.

Towage continued in the same fashion during the early morning hours of January 18 until 0600 when, after the barge was known to be down by her head, the tug's engine speed was *increased*.

The log entry for 0600, January 18, 1964, reads:

> "Increase engine speed to 600 r.p.m. Sea moderating some extent."

The 12:00 noon entry for January 18 reads:

> "Tug and tow rolling heavily at times to moderate Rough N'ly sea. Offshore 58# is down by head app. 4-5 ft."

In spite of the worsening condition of the barge, towage continued until 12:30 at which time the JUNO personnel decided, for the first time, to stop the tug and to circle, but not board, the rig. The tug and tow were then about sixty miles northwest of the Yucatan Strait. (356)

The JUNO changed course at about 3 P.M. that afternoon, January 18, 1964 and headed toward Tortugas, en route to Key West. Towage was still continued at full speed and still no effort whatever was made to board and inspect, discover the cause of the trouble and alleviate, correct or minimize the damage. Full speed was maintained throughout January 18, 19, 20 and 21, 1964. The tug passed Tortugas and proceeded on to Key West without stopping. (356)

No effort was made to put into any port of refuge at or near Tortugas, such as Garden Key, which is near the western tip of the string of keys jutting into the Gulf of Mexico from the southern tip of Florida, or any other number of locations where the barge could have at least been inspected.

Libelant argued to the district court that the JUNO's failure to inspect or take any remedial action at daybreak on January 17, 1964, made it incumbent upon the JUNO's personnel to come forward with a reasonable explanation of what happened pursuant to the rule in *Chemical Transporter, Inc.* v. *M. Turecamo, Inc.*, 290 F. 2d 496 (2 Cir., 1961); *Sternberg Dredging Co.* v. *Moran T.&T. Co.*, 196 F. 2d 1002 (2 Cir., 1952; *The CLARENCE HOWLAND*, 16 F. 2d 25 (2 Cir., 1926); *American Bridge Division* v. *Roen Steamship Co. and Tug JOHN PURVES*, 328 F. 2d 838 (7 Cir., 1964); and *the ANACONDA*, 164 F. 2d 224 (4 Cir., 1947).

Libelant further argued that this is a classic *res ipsa loquitor* case in that the barge was delivered to the tug in

good seaworthy condition; the tug had complete custody and control of the barge at all times; the tug and tow were navigating in the Gulf of Mexico in an area where the water is deep and no obstruction exists; and that damage of the type inflicted upon ½" plating does not normally occur in open waters of the Gulf of Mexico.

An intimation was made to the effect that there might have been some floating logs which might have inflicted the damage to the forward end of the barge, but there was no proof that floating logs were in fact present or that they struck the barge or that they could have caused the damage in question. (358, 359)

Respondent argued to the District Court that even though it had sole custody and control of the barge and even though libelant had no employee or other witness board either the tug or the tow, libelant nevertheless was obligated to prove specific acts of negligence upon the part of those in charge of the Tug JUNO with respect to the cause of damage to the bow plates.

Separate and apart from what damaged the bow plating and caused the barge to commence taking water, is the question of negligent lack of care of the barge after the JUNO's officers knew or had reason to know that something was amiss. In this connection, libelant argued that the JUNO's failure to do anything whatsoever at daybreak on January 17, when the navigator was sufficiently alarmed to call the Captain's attention to the condition of the barge, was negligence; that the JUNO's entire course of conduct from daybreak on January 17 to 0600 on January 18, when speed was increased to 600 r.p.m., was additional negligence; and that the tug's conduct from the time course was changed at 3 P.M. on January 18 for Tortugas and then to Key West was a continuation of the same disregard for

the welfare of the barge which started at daybreak on January 17, 1964.

From daybreak on January 17 to the time course was changed at about 3 P.M. on January 18, the tug JUNO was stemming the current of the Gulf Stream and by proceeding against the current without reduction in speed (364), seas would necessarily be forced into the barge's hull. The flooding of the three forward compartments did not do any material damage, as those compartments were void spaces. However, said flooding permitted the bow of the barge to sink progressively deeper into the water so that the barge's main deck, forward, tilted from a horizontal position and came closer and closer to the surface of the water as the towage continued, until ultimately the leading edge of the main deck was awash. This, in turn, permitted seas to come on deck, swirl about and enter the generator house. The salt water damaged electrical equipment in the generator house.*

The district court accepted substantially all of libelant's contentions except the first (that the rule of the *Chemical Transporter* and *Sternberg* cases controlled). Even as to that point the district court stated (359):

> "In my judgment, the question (of law) is very close."

With regard to the other contentions, the district court stated (363):

> "The second prong of libelant's attack is better taken. The failure to take prompt action for relief of the Barge, after discovery of her difficulty, shows such a lack of judgment and skill on the part of the JUNO's

* Most of the costs of repairs related to the contents of the generator house. The cost of welding the punctures in the bow plating was relatively small.

officers as to render her liable for damages which result therefrom."

The court directed in its memorandum that libelant should recover damages resulting from the delay in getting the barge to Key West calculated as though the delay had begun *no later* (emphasis added) than noon on January 17 (367), and further directed proctors for libelant to submit an appropriate decree which would, among other things, provide for appointment of a Special Commissioner to hear and report in respect of libelant's damages.

Proctors for libelant prepared and submitted a proposed decree reading in part as follows:

> "ORDERED, ADJUDGED and DECREED that libelant, The Offshore Company, as owner of the drill barge Rig 58, recover of and from respondents, G. & H. Offshore Towing Co., Inc., and the Tug JUNO whatever damages or losses it sustained that resulted from the events that took place after barge 58 was holed on or about January 17, 1964, in connection with respondents' delay in getting her to a port of refuge at Key West, Florida, and after said barge was known by respondents to be down by her head and in need of assistance, * * *"

Proctors for respondents ojected to the terminology and, after a hearing before the court, obtained a decree reading in part as follows:

> "ORDERED, ADJUDGED and DECREED that libelant, The Offshore Company, as owner of the drill barge Rig 58, recover of and from respondents, G. & H. Offshore Towing Co., Inc. and the Tug JUNO, the damages, if any, resulting from the delay *after* noon on January 17, 1964, in getting the barge to Key West." (emphasis added)

Libelant argued to the district court that no arbitrary time should be selected; that the first acts of negligence (apart from the initial damage to the hull of the barge) occurred at or about daybreak on January 17 and that libelant was entitled to recover, pursuant to the district court's decision, all damages flowing from any negligence after the initial impact, and should not be limited to whatever damage occurred after the arbitrarily selected time of 12 o'clock noon, January 17, 1964.

However, the district court held otherwise and signed the decree proposed by proctors for respondents and referred the question of damages to a Special Commissioner.

The Special Commissioner, strictly construing the decree, held that by noon on January 17, with the bow down some three feet (3') and seas breaking over the deck, the contamination of the electrical equipment inside the generator house had begun and concluded that the generator house would probably have contained no less water upon arrival at Key West, and that the electrical and mechanical equipment therein would have been wetted to an equal extent by salt water and sweat, had the JUNO altered course for Key West no later than noon on January 17. (Appendix B)

The Special Commissioner placed the entire burden on libelant, an innocent party who had nothing to do with the gross negligence of the JUNO, of segregating the amount of damage, if any, to electrical equipment within the generator house before 12 o'clock noon on January 17 from that which occurred thereafter, and recommended that the district court make no allowance to libelant for damages.

Libelant filed exceptions to the Special Commissioner's report, which were overruled, and a decree was entered dismissing the libel.

The Offshore Company filed an appeal to the United States Court of Appeals for the Fifth Circuit from the decree of the district court.

A quorum of the Court of Appeals affirmed. (Appendix C)

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals for the Fifth Circuit is in conflict with several decisions of this court which hold that a tort feasor cannot avoid payment of compensation on the grounds that such compensation cannot be measured with exactness and precision. It also conflicts with decisions of state and other Circuit Courts to the same effect.

The district court disallowed recovery of the cost of repairing bow damage on the theory that libelant failed to prove negligence in connection with the cause of that damage, but held that the JUNO's failure to take prompt action for relief of the barge, after discovering that she was going down by the bow, showed such lack of judgment and skill on the part of her officers as to render her liable for the damage resulting therefrom (363), which consisted mostly of damage to the contents of the generator house.

The Special Commissioner, using the arbitrary time of 12 o'clock noon, many hours after the barge was known to be going down by her head, commented that by that time, with the bow down some three feet and seas breaking over the deck, the contamination of the contents of the generator house had begun, and he recommended that no allowance for damage be made because libelant had not met its alleged burden of proof of segregating damages.

The Second Circuit held in *Navigazone Libera T.S.A.* v. *Newtown Creek T. Co.*, 98 F.2d 694 (2 Cir., 1938), that when

one of two contributing factors is not the result of actionable fault

> "* * * the single tort feasor cannot be allowed to escape through the meshes of a logical net. He is a wrongdoer; let him unravel the casuistries resulting from his wrong * * *" (p. 697)

The Second Circuit analogized the two contributing factors situation with a situation involving two tort feasors, where the injured party may recover completely from either tort feasor because, as the court put it, if the injured party had to prove the amount of damage caused by each tort feasor, both would escape — an absurd result.

The same holding was reached in *Nassau Sand & Gravel Co., Inc.* v. *Red Star Towing & Transportation Co., Inc.*, 62 F. 2d 356 (2 Cir., 1932), which follows Judge Hough's holding in *The Mason*, 249 Fed. 718, at 720:

> "It is assuredly a settled general rule, though oftenest applied in collision, that a fault in one party, once firmly established, casts upon that party the burden of showing any contributing fault committed by his opponent. * * * The analogue of this rule is applicable to matters of damage, * * * the party in fault upon the merits of the case must bear whatever inconvenience or hardship there may be in proving the exact amount of damages sustained; and, if the party not in fault 'derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise affecting such indemnification without exposing him to some loss or burden which the law will not place upon him.'"

The Supreme Court has spoken very vigorously regarding technicalities of proof which permit wrongdoers to escape payment. In *Story Parchment Company* v. *Paterson*

Parchment Paper Company, 282 U.S. 555 (1931), Mr. Justice Sutherland commented at page 563:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damage with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts. In such case, while the damage may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

Citing a Michigan case, the Court quoted, at page 564:

> "To deny the injured party the right to recover any actual damages in such cases, because ther are of a nature which cannot thus be certainly measured, would be to enable parties to profit by, and speculate upon, their own wrongs, encourage violence and invite depredation. Such is not, and cannot be the law, though cases may be found where courts have laid down artificial and arbitrary rules which have produced such a result."

And again, at page 565:

> "such reasonable and probable estimates, as in the exercise of good sense and sound judgment they shall think will produce adequate compensation. There is no sound reason in such a case, as there may be, to some extent, in actions upon contract, for throwing any part of the loss upon the inured party, which the jury believed from the evidence he had sustained; though the precise amount cannot be ascertained by a fixed rule, but must be matter of opinion and probable estimate. *And the adoption of any arbitrary rule in*

> *such a case, which will relieve the wrongdoer from any part of the damages and throw the loss upon the injured party, would be little less than legalized robbery.*" (emphasis added)

Drill Barge 58 had been specially prepared for this towage and was found by the court to be in good condition upon delivery to the Tug JUNO. Seven days later she was in damaged condition.

At daybreak on January 17, 1964, a perceivable list was detected, but there was nothing to indicate that any water had entered the generator house or damage the equipment therein at that time.

The Special Commissioner and the courts below placed upon the innocent and injured party an impossible burden of proof, which was led to an absurd result. The decision should be reversed.

2. The decision of the Court of Appeals for the Fifth Circuit conflicts with decisions of the Second, Fourth and Seventh Circuit Courts regarding inferences to be drawn and burden of establishing freedom from fault in connection with damage to a tow where the tug's navigation has been found negligent.

In *Sternberg Dredging Co.* v. *Moran T. & T. Co.*, 196 F. 2d 1002 the Second Circuit, by L. Hand, C.J., considered an appear where a dredge showed a perceptible list at 4:30 and sank 3 hours later at 7:30 P.M. The tug had done nothing but continue at half speed after discovering the list.

The Second Circuit held that failure to do anything upon noticing the list is actionable negligence and that the tug was charged with the burden of producing evidence that her fault did not cause the damage, stating at page 1006:

> "We do not forget that Stevens v. The White City, supra, 285 U.S. 195, 52 S.Ct. 347, 76 L.Ed. 699, estab-

> lished it that a towing contract does not make the tug bailee of her tow; but it does not follow that she should not be charged with the burden of producing evidence that her fault did not cause the damage; and, quite regardless of whether there is any general rules, it is enough in the case at bar that the tow had no power to show what in fact caused the disaster; and that, if the tug had done her duty, the cause would probably have been disclosed. It is often a controlling factor in deciding where to throw the burden of producing evidence — and obviously it ought to be — that the proper party to charge is he who alone could discover the truth."

On rehearing, 200 F. 2d 603, the Second Circuit stressed that the dredge should have been inspected when the list appeared.

The opinion of the Second Circuit in *Chemical Transporter, Inc.* v. *M. Turecamo,* 290 F. 2d 496, was also written by Judge L. Hand. In that case both the barge and the tug were at fault, but the tug's fault occurred after the consequences of the barge's fault had become apparent.

The barge's fault consisted of a hole in the aftertank 5′ below deck, 3″ x 5″ in size. It was contended that after the barge was loaded, the tank filled from water coming through the hole which had been brought below the water line.

The tug's fault was failure to adapt its navigation after the barge's plight became apparent.

The Circuit Court affirmed the district court's action holding the tug at fault for improper navigation after discovery of the tow's position of peril, then, on its own motion, raised the question of divided damages as follows (497):

> "The tug was therefore guilty of negligence and was liable; and the question arises whether the case does not fall within the ordinary doctrine that damages are

> divided when both parties are at fault. Neither party has raised the point in the case at bar, but we will pass on it now because the answer is clear, at any rate in this court. In at least four decisions we have passed upon carelessness of a tug that caused damage to another vessel, which was herself also guilty of an earlier fault, contributing to the result; and we have held that, if the fault of the earlier vessel was obvious to the tug in time for the tug to accommodate her own navigation to the emergency, the tug alone was liable. *Henry DuBois Sons Co.* v. *Pennsylvania R. Co.*, 2 Cir., 47 F. 2d 172; *The Perseverance*, 2 Cir., 63 F. 2d 788; *The Sunday*, 2 Cir., 122 F. 2d 325; *Sternberg Dredging Co.* v. *Moran Towing & Transp.*, 2 Cir., 196 F. 2d 1002. In *The Cornelius Vanderbilt*, 2 Cir., 120 F. 2d 766, we assimilated this situation to that of 'last clear chance', and, indeed, that is what it is. When the fault of the first vessel appears or should be evident to the second early enough for the second to escape injury to the first vessel herself, she must do so, if no more is required than a change in navigation of the second vessel which involves no further burden than inconvenience. We can see no reason why because the first vessel has imposed so trifling a burden on the second, she should be punished by the loss of relief for the injuries which the second has caused her. We do not mean to question the validity of dividing damages when the faults are simultaneous or substantially so, but cases such as that at bar demand a different treatment."

The decision of the Court of Appeals for the Fifth Circuit in this case also conflicts with decisions of the Fourth Circuit in *Detyens* v. *Marine Industries, Inc.*, 349 F. 2d 357 (4 Cir., 1965) and of the Second Circuit in *American Bridge Division, United States Steel Corporation* v. *Roen Steamship Company*, 328 F. 2d 838 (1964). In the latter case, at page 839, the Court cited and followed the *Sternberg* case, supra, holding a tug at fault for failure to take any precautions when the barge was known to be taking on water and gradually becoming lower at the bow.

See also *Appeal of Cahill*, 124 F. 63 (2 Cir.,), *Coleman* v. *Aiken*, 242 F. 239 (5th Cir.,) and *The Joseph F. Clinton*, 250 F. 977, 979 (2 Cir.,).

According to the holdings of the above cited cases, Drill Barge 58 was entitled to some effort on the part of the JUNO after her navigator was sufficiently alarmed to discuss the barge's condition with the Captain at daybreak, but no effort of any kind was made, such as reduction in speed or a change in course. The barge was entitled to that effort at the time the question first arose — not seven hours later at an arbitrary time of 12 o'clock noon, January 17, 1964. The JUNO should be held at fault for failure to inspect and failure to even attempt to aid its tow.

3. The doctrine of res ipsa loquitor applies in admiralty with respect to a tug having complete custody and control of an unmanned barge which becomes damaged while being towed in the open unobstructed waters of the Gulf of Mexico while on a voyage from offshore Louisiana to Trinidad.

The ruling of the court below not only places the Fifth Circuit in conflict with the Second Circuit in *Appeal of Cahill*, 124 Fed. 63 and *The Joseph F. Clinton*, 250 Fed. 977, 979, and the Fourth Circuit in the Anaconda, 164 F. 2d 224, but also in conflict with its own decision, rendered by a different panel, in *Bisso v. Waterways Trans. Co.*, 235 F. 2d 741 (5 Cir., 1956).

The district court, in addition to finding that the barge was in good condition at time of delivery, found that "she and her sister ships previously had been towed without incident to practically all the offshore oil producing areas of the world" (353), and further found that "the damage had obviously been inflicted by some heavy object or objects which had come in violent contact with the hull during

the towage' (357) which consisted of "5 holes which from the pictures in evidence appear to vary in size from a split perhaps 2" wide to a puncture about the size and shape of a football" (357).

Exhibit 3, a chart of the Gulf of Mexico, shows that the depth of water was several hundred fathoms and that there were no fixed obstructions or derelicts along the route being followed by the flotilla.

In short, there was nothing along the flotilla's route which could cause damage to the bow of the barge except the tug and the tug's towing gear.

These circumstances plus the fact that the barge was unmanned and completely in the custody and control of the tug result in a presumption of negligence on the part of the JUNO. This rule is illustrated by *Bisso* v. *Waterways Trans. Co.*, supra:

> "This brought into play the sensible rule that, even though the engagement is in contract so that the duty of the tug toward the tow is that of due care only, with the consequent burden of the tow of establishing negligence [citing cases] a stranding which occurs under circumstances which ordinarily results in no such casualty puts on the tug the obligation of some satisfactory explanation. 'When an accident occurs to the tow the action is ex delicto and the burden is on the tow to show negligence on the part of the tug. However, circumstances may create a strong presumption of negligence. In that event the burden is on the tug to rebut the prima facie case or, at least, to show a reasonable excuse for the accident other than its own negligence . . . '" 235 F. 2d 741 at p. 744.

The JUNO is charged with the burden of proof, pursuant to the above cited cases, that she was in no way responsible for the damage to the barge's bow. Having failed

to establish the cause of bow damage, the JUNO should be held at fault for all damage sustained by the barge.

4. The decisions of our courts in cases such as this have wide applicability relating to the measure of damages, implicit in most litigation, and the results of these decisions, both as to merits and damages, are of substantial concern to the shipping public.

Adoption of an arbitrary rule which relieves a wrongdoer from payment of any part of the damages and throws the loss upon the innocent and injured party is, as stated by a Michigan court, little less than legalized robbery, and should not be allowed to stand as a yardstick applicable in this or any other case where an unjust burden is thrown on an injured party.

In addition to public interest and widespread applicability, it is manifestly wrong for a party who has been found guilty of "gross negligence" and "callous indifference to the welfare of the tow" to avoid liability on the merits for damages sustained while the barge was in such party's exclusive custody control.

The wide applicability of towage can be illustrated by comparison with the Mississippi River system, which is only a small part of our overall transportation system, including, among others, the Great Lakes, Atlantic Seaboard, Pacific Seaboard, and international towage to various parts of the world. Tonnage for 1966 on the comparatively short Mississippi River System from Minneapolis to the Gulf of Mexico was 193,950,405, the equivalent of transportation of one ton of freight around the earth at the equator 2,722,452 times.

The Gulf Intracoastal Waterway and its connecting inland and Gulfcoast streams supported in 1966 traffic involv-

ing 321,756,407 tons. (Corps of Engineers, "Mississippi River Navigation", March 1968 Ed. pp. 5 and 6.

The importance of the effect of opinions of the courts below may be realized when considered in conjunction with the vast amount of towage in coastal and international waters.

There is the added fact that the district court in this case, making specific reference to *Detyens Shipyards, Inc.*, v. *Marine Ind. Inc.*, 349 F. 2d 357 (4 Cr., 1965); *Bisso* v. *Waterways Trans. Co.*, 235 F. 2d 741 (5 Cir., 1956); *Sternberg Dredging Co.* v. *Moran T.&T. Co.*, 196 F. 2d 1002 (2 Cir., 1952), on Reh. 200 F. 2d 603; *The Anaconda*, 164 F. 2d 224 (4 Cir., 1947); *Simpkins* v. *Morrison & Sons*, 107 F. 2d 121 (5 Cir., 1939); *The Sterling Tompkins*, 56 F. 2d 740 (2 Cir., 1932); and *The Clarence P. Howland*, 15 F. 2d 25 (2 Cir., 1926), stated that there was a difficult question as to which line of cases to follow, then declined to apply the rule prevalent in the Second, Fourth and Seventh Circuits, saying that the opinions of those courts pay lip service to *Stevens* v. *The White City*, 285 U.S. 1955, but find liability on nebulous grounds.

A quorum of the Fifth Circuit, with one Circuit Judge not participating in the final draft, affirmed, thus casting doubt and confusion on an area of law which theretofore was clear, at least in the Second and Fourth Circuits and probably clear in the Fifth Circuit.

CONCLUSION

Petitioner respectfully submits that the reasons stated in this petition are of importance sufficient to justify the review of the judgment of the Court of Appeals for the Fifth Circuit by writ of certiorari.

It prays, therefore, that the writ issue and that, upon its review, this Honorable Court be pleased to order the judgment of the Court of Appeals reversed and the cause remanded for further proceedings consistent with the doctrine that the owner of a tug whose master has been found grossly negligent and who displayed an attitude of callous indifference to the welfare of the tow entrusted to his care should be liable for its failure to come forward with evidence as to when and where and under what circumstances the tow was damaged; and, in any event, that there is no justification for the adoption of an arbitrary segregation rule which relieves a wrongdoer from payment of damages and casts all losses upon the innocent and injured party, and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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Dated Houston, Texas, February 24, 1969.